
U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 18, 1989
CASE NO. 87-ERA-38

IN THE MATTER OF

LORENZO MARIO POLIZZI,
COMPLAINANT,

v.

GIBBS & HILL, INC.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER REJECTING IN PART AND APPROVING
IN PART SETTLEMENT SUBMITTED BY
THE PARTIES AND DISMISSING CASE

On July 13, 1988, the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), issued a Recommended Decision and Order (R.D. and O.) dismissing this matter with prejudice on the grounds that the parties had resolved the issues between them. The parties bad made a joint motion to the ALJ requesting the entry of an order of dismissal on the grounds that the parties had entered into a settlement agreement.

The record submitted to the Secretary with the ALJ's R.D. and O. did not include a copy of the settlement agreement. Accordingly, on October 3, 1988, the Secretary issued an Order to Submit Settlement Agreement ordering the parties to submit a copy of the settlement agreement for review by the Secretary. On November 3, 1988, the parties submitted a copy of the settlement agreement to the Secretary.

The ERA requires the Secretary to issue an order resolving the case "unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement

entered into by the Secretary and the person alleged to have committed such violation . . . . ." 42 U.S.C. § 5851(b)(2)(A). The Secretary has held a number of times in ERA cases that the case cannot be dismissed on

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the basis of a settlement "unless the Secretary finds that the settlement is fair, adequate and reasonable." *Fuchko and Yunker v. Georgia Co*., Case Nos. 89-ERA-9, 10, Secretary's Order to Submit Settlement Agreement issued March 23, 1989, at 2, and cases cited therein. Furthermore, the Secretary held that "it is error for the ALJ to dismiss a case without reviewing the settlement and making a recommendation of whether the settlement is fair, adequate and reasonable." *Id*. at 1-2.

The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits.[1] Protected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers. *Cf*., *Virginia Electric and Power Co*., 19 FERC para. 61,333 (Federal Energy Regulatory Commission 1982) ("[B]efore approving a settlement, regardless of whether it is contested or enjoys the unanimous support of the parties, the Commission is obliged to make an independent determination that the settlement is just and reasonable and in the public interest.")

The settlement agreement in this case has been carefully reviewed. With the exception of two provisions, I find it fair, adequate and reasonable.

Paragraph 7 of the Settlement Agreement provides:

> Polizzi agrees that he will not voluntarily cooperate with or testify on behalf of any entity or individual who has or may file charges of discrimination or wrongful employment practices against Gibbs & Hill or TUGCO, or their respective parents, affiliates, subsidiaries, successors or assigns, under the Energy Reorganization Act, the Atomic Energy Act of 1954 as amended, or any other federal or state law, rule, regulation or theory, nor will he voluntarily testify in or otherwise participate in any proceeding or investigation involving the Comanche Peak Steam Electric Station, before any state or federal court or administrative agency, including, but not limited to licensing or safety proceedings or

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> investigations before the Nuclear Regulatory Commission and/or regulatory or rate proceedings or investigations before the Public Utility Commission of the State of Texas, except as required by lawful subpoena; provided, however, that nothing in the foregoing paragraph shall in any manner be interpreted to prevent Polizzi from informing the Nuclear Regulatory Commission of any and all safety concerns he may have relating to the Comache Peak Steam Electric Station.

This provision prohibits Complainant, among other things, from providing information to, or assisting or cooperating with, the Department of Labor in investigations of complaints against Respondent, the Texas Utilities Generating Company, or any related company under the ERA or any other environmental whistleblower protection statute. 29 C.F.R. § 24.1 (1988). Paragraph 7 also would prohibit Complainant from providing information or assisting or cooperating with the Department of Labor or any other federal or state agency in the investigation or prosecution of any charge of discrimination or wrongful employment practices, in violation of any federal or state law, rule, or regulation. This could include, for example, the Fair Labor Standards Act, the Occupational Safety and Health Act, Executive Order No. 11,246, Section 503 of the Rehabilitation Act of 1973, and Title VII of the Civil Rights Act of 1964. This provision also prohibits Complainant from voluntarily testifying or otherwise participating in any proceeding or investigation involving the Comanche Peak Steam Electric Station, including Nuclear Regulatory Commission licensing or safety proceedings or investigations, and state regulatory or rate proceedings or investigations. This prohibition could include investigation or enforcement proceedings by the United States Environmental Protection Agency. The only exception to these restrictions would be where Complainant is under lawful subpoena.

On May 4, 1989, Complainant's counsel provided the Department's Office of Administrative Appeals a copy of a letter to him from Respondent's counsel dated May 3, 1989, by which Respondent "waives now and forever any rights it may have to enforce any restrictions that may be construed to be imposed upon [Complainant] under paragraph 7 of the settlement agreement . . . . [Complainant] may freely go to the Nuclear Regulatory Commission at any time without fear of any form of retribution from [Respondent]." Although the first sentence of

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this letter appears to nullify paragraph 7 in its entirety, the second sentence could be interpreted as limiting Respondent's waiver to the restriction on Complainant's right to go to the NRC. For that reason, I have fully reviewed paragraph 7, as well as all other provisions of the settlement.

Paragraph 7 of the Settlement Agreement significantly restricts access by the Department of Labor, as well as other agencies, to information Complainant may be able to provide relevant to the administration and enforcement of the ERA and many other laws. Its effect, to a large degree, would be to "dry up" channels of communication which are essential for government agencies to carry out their responsibilities. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). As such, I find it against public policy.[2]

In *EEOC v. Cosmair, Inc*., 821 F.2d 1085 (5th Cir. 1987), the court held that of the right to file a charge with EEOC was void as against public policy. The court distinguished between waiver of the right to file a charge and waiver of the right to recover personally on a cause of action. The court explained:

> Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws . . . . A charge not only informs the EEOC of discrimination against the employee who files the charge . . . but also may identify other unlawful company actions. When the EEOC acts on this information, "albeit at the behest of and for the benefit of specific individuals, it also acts to vindicate the public interest in preventing employment discrimination." . . . We hold that an employer and an employee cannot agree to deny to EEOC the information it needs to advance the public interest.

821 F.2d at 1090 (citations omitted.) Following the Supreme Court's guidelines that "[a] promise is unenforceable if the interest in its enforcement is outweighed by a public policy harmed by enforcement of the agreement," *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), the court in *EEOC v. Cosmair, Inc*., held that a "waiver of a right to file a charge is void as against public policy." 821 F.2d at 1090. The restriction on

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access by government agencies to Complainant's information here is, if anything, greater than in *EEOC v. Cosmair Inc*., and I find that it is unenforceable as against public policy.

In addition, the settlement appears to encompass the settlement of matters arising under various laws, only one of which is the ERA. As stated in *Poulos v. Ambassador Fuel Oil Co., Inc*., Case No. 86-CAA-1, Secretary's Order, issued November 2, 1987, slip op. at 2:

> [The Secretary's] authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statutes. See *Aurich v. Consolidated Edison Company of New York, Inc*., Case No. CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987, *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Decision and Order on Remand, issued November 3, 1986.

I have, therefore, limited my review of the agreement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

Although I have found that one provision of the Settlement Agreement, paragraph 7, is unenforceable as against public policy, the remainder of the agreement may be enforceable when "performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." *EEOC v. Cosmair, Inc*., 821 F. 2d at 1091 (quoting the Restatement (Second) of Contracts, § 184(1) (1981).) *See also Nichols v. Anderson*, 837 F.2d 1372, 1375 (5th Cir. 1988) ("[I]f less than all of a contract violates public policy, the rest of the contract nay be enforced unless the unenforceable term is an essential part of the contract.") Thus, in *McCall v. United States Postal Service*, 839 F.2d 664 (Fed. Cir. 1988), an employee had settled an action challenging his removal by

agreeing that, upon resinstatement for one year probationary period, he would not appeal any disciplinary action taken against him and also waived his right to file a charge with EEOC. The court held that "even if [the employee's] attempted waiver of his right to file EEOC charges is void, that would not affect the validity of other portions of the agreement." 839 F.2d 664, 666 at *.

Here, the provisions of paragraph 7 of the Settlement Agreement appear to be collateral to the central dispute which

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the agreement purported to settle, alleged retaliation by Respondent against Complainant for protected activities, in violation of the ERA. I have attached primary significance in reaching this conclusion to the fact that Respondent has expressly waived any right to enforce the restrictions in paragraph 7. In addition, most, if not all, of the restrictions placed on Complainant by paragraph 7 would apply in matters only remotely related, if at all, to their dispute under the ERA.

I also note that paragraph 2 of the agreement could be construed as a waiver by Complainant of any causes of action may have which arise in the future. As the Secretary has prior cases, *see Johnson v. Transco Products, Inc*., Case No. 85-ERA-7, Secretary's Order Approving Settlement issued August 8, 1985, such a provision must be interpreted as limited to the right to sue in the future on claims or causes of ILLEGIBLE out of facts or any set of facts occurring before the date of agreement. *See also Alexander v. Gardner-Denver Co*., 415 U.S. 36, 51-52 (1974); *Rogers v. General Electric Co*., 781 F.2d 452, 454 (5th Cir. 1986).

With the exception of paragraph 7, and with the limitations discussed above, I find the terms of the agreement within the scope of my authority under the ERA to be fair, adequate and reasonable, and to that extent I approve it.

Accordingly, the complaint in this case is DISMISSED.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] I note that in ordinary lawsuits brought by one private party against another private party, where the rights of other persons will not be affected, "settlement of the dispute is solely in the hands of the parties." *United States v. City of Miami*, 614 F.2d 1322, 1330

(5th Cir. 1980), *aff'd in part and reversed in part on rehearing en banc*, 664 F.2d 435 (1981). Thus, under Fed. R. Civ. P. 41(a)(1)(ii), a stipulation signed by all parties who have appeared in the court action is effective automatically, without judicial involvement. *Gardiner v. A.H Robins Co Inc*., 747 F.2d 1180, 1189 (8th Cir. 1984). The trial court judge must "'stand[] indifferent,'" and not interfere with the parties' "unconditional right" to a dismissal by stipulation. Id. at 1189-1190 (citation omitted). See also Janus Films. Inc. v. Miller, 801 F.2d 578, 582, 585 (2d Cir. 1986); City of Miami, 614 F.2d at 1332.

[2] A settlement a contract, and its construction and enforcement are governed by principles of contract law. *United States v. ITT Continental Baking Co*., 420 U.S. 223, 238 (1975); *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 905 (11th Cir. 1987); Orr v. Brown & Root Inc., Case No 85-ERA-6, Secretary's Decision and Order issued October 2, 1985, at 2. The doctrine that a promise or term of an agreement is unenforceable if against public policy encompasses more than illegality; it includes promises which are injurious to the public interest. *Shadis v. Beal* , 685 F. 2d 824, 833, n. 15 (3d Cir. 1982), *Cert. denied* 459 U.S. 970 (1982). "Contracts contrary to public policy, that is those which tend to be injurious to the public or against the public good, are illegal and void, even though actual injury does not result therefrom." 17 C.J.S. *Contracts* § 211, p. 1013 (1963).